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*** Electronically Filed ***
03/12/2009 8:00 AM

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2009-006509 03/11/2009

HONORABLE JOSEPH B. HEILMAN

CLERK OF THE COURT
L. Muhammad
Deputy

ARIZONA ASSOCIATION OF PROVIDERS FOR PERSONS WITH DISABILITIES, et al.

JOHN R DACEY
JAMES A CRAFT

v.

STATE OF ARIZONA, et al.

JULIET PETERS

NICOLE C DAVIS
FRED M ZEDER

**MINUTE ENTRY**

**STATEMENT OF THE CASE**

Plaintiffs allege that the actions of the State in enacting SB 1001, First Special Session, 2009 Arizona Legislature (Hearing Exhibit #1), and in implementing the cuts and reductions as described in Hearing Exhibit #2, violate numerous federal and state laws, the due process clauses of the Arizona and United States Constitutions, and other provisions of the Arizona Constitution.

Defendants deny that SB 1001 violates the Arizona Constitution; deny any unconstitutional taking of plaintiffs' property or of any disproportionate impact of the budget reductions on DES-DDD and its beneficiaries; or that they have or will violate federal and state laws through the suspension and reduction of services and payments.

On February 27, 2009, plaintiffs filed their Complaint and sought a temporary restraining order. By agreement of the parties, this Court heard oral argument on plaintiffs' request for a temporary restraining order that afternoon. This Court denied the application and then set the matter for an evidentiary hearing on plaintiffs' application for a preliminary injunction. On March 2 and 3, 2009, this Court conducted an evidentiary hearing on the Plaintiff's request for a Preliminary Injunction in the above-captioned matter. The Plaintiffs were represented by John

Dacey and James A. Craft of Gammage and Burnham, P.L.L.C. The Defendants were represented by Juliet Peters, Fred Zeder and Nicole C. Davis of the Arizona Attorney General's Office.

The Court has heard, considered and weighed all of the testimony and exhibits presented at the hearing and those which the Court has taken judicial notice of.[1] Based upon this evidence, the applicable standards of law and being fully advised, the Court makes the following Findings of Fact and Conclusions of Law and issues this Order as required by Rule 65 of the Arizona Rules of Civil Procedure. Further, such Conclusions of Law shall constitute Findings of Fact as may be appropriate.

**BACKGROUND AND SUMMARY OF RULING**

The Arizona Department of Economic Security, Division of Developmental Disabilities [DES/DDD], is the State agency primarily responsible for the care of nearly 30,000 of Arizona's most vulnerable citizens, those who, for the most part, are unable to care for themselves. These beneficiaries include the new born in hospital nurseries to the aged in long term care facilities.

Developmental disabilities are defined by law and include cognitive disabilities, autism, cerebral palsy and epilepsy, as well as strongly-demonstrated potential in children under six years of age to become developmentally disabled. Many program beneficiaries of DES-DDD also have other conditions that require constant services and supervision.

If they are beneficiaries of DES they are either completely destitute or, as a result of the inordinate cost of their care, pose such a drain on their families' economic resources that poverty is often only a paycheck away.

The plaintiffs can be easily divided into three separate groups. Plaintiff Arizona Association of Providers for Persons with Disabilities [AAPPD] is an organization of service providers representing 82 of the 850 such agencies.

Plaintiffs, Reeves Foundation, LLC, ABRiO Family Services and Supports, Inc., Family Partners, LLC, and Metro Care Service, Inc., are all licensed providers of various services, all of

[1] After the hearing, the defendants submitted a *Request for Judicial Notice in Support of Closing Statement, Findings of Fact and Conclusions of Law.* The Court has read and considered these 3 additional exhibits, consisting of: Exh 1)copies of the Qualified Vendor Agreements for plaintiffs ABRiO Family Services, Inc., Metro Care Services, Inc., and, Reves Foundation, L.L.C.; Exh. 2) a copy of 42 U.S. Code §1396u-2; and, Exh 3) A copy of 42 C.F.R. § 438.207.

which are under contract to DES/DDD, members of AAPPD, and will be referred to hereinafter as the "Agency Plaintiffs."

Plaintiffs, Beverly Herman and Toni McLeod are both individual care givers and legal guardians (and in the case of Beverly, Mother) of Plaintiffs Eric Hermon, E.K. and R.K., who represent the third and final class of Plaintiffs, the ultimate beneficiaries of DDD programs and services. Ms. McLeod has had physical custody of E.K. and R.K. since they were children. They are both now adults as is Eric Hermon. Plaintiff Dominic Barrera is also an adult beneficiary. All four beneficiaries are cognitively disadvantaged. Mr. Hermon also suffers from grand mal seizures, and Mr. Barrera is totally blind. Mr. Berrera lives alone in Coconino County. All three of the other beneficiaries live with their respective care givers. These Beneficiary Plaintiffs are fairly representative of the 30,000 or so other beneficiaries of DDD.

In addition to corporate/agency providers, DDD also uses some 3500 independent and individual providers. It is this group of both agency and individual providers who comprise the Home and Community Based Services provider network [HCBS]. The importance of the HCBS will be explained below. It suffices to say for now, that with respect to the provision of services for which DDD is responsible, it is the HCBS who provides the greatest majority of those services.[2]

DES/DDD receives its funding from both federal and state sources. The interrelationship of this funding is addressed more precisely below, however, the federal funds (referred to hereinafter as "Title XIX" funds flow from the federal Medicaid Program through the Arizona Health Care Cost Containment System [AHCCCS] to the Arizona Long Term Care System [ALTCS]. The state funds are paid directly out of the state budget, and are applied to the "State Only" programs administered by DDD.

However, in equipoise to the plight of these citizens is the financial crisis now facing the county, state, country and, indeed the world. At the time of the writing of this order, March 6, 2009, the Associated Press reports:

> WASHINGTON – The nation's unemployment rate bolted to 8.1 percent in February, the highest since late 1983, as cost-cutting employers slashed 651,000 jobs amid a deepening recession.

[2] The evidence discloses that in addition to these "outside" providers, DES also maintains an institutional program known as the Arizona Training Program in Coolidge, Arizona, and other intermediate care facilities operated by DES with it's own staff.

> Both figures were worse than analysts expected and the Labor Department's report shows America's workers being clobbered by a wave of layoffs unlikely to ease in the coming months. . . .
>
> February's net job loss came after even deeper payroll reductions in the prior two months, according to revised figures released Friday. The economy lost 681,000 jobs in December and another 655,000 in January.

A quick review of the website AZCentral.com discloses that there are now 5.4 million homes in foreclosure across the country, a share of GM stock can be purchased for $1.47 ( a 21% drop from yesterday's price) and the stock market closed yesterday at it's lowest point since 1996. The concomitant loss of revenue for state and local governments has been disastrous, and as a result of this crisis[3] the 39th Legislature of the State of Arizona, in special session, passed SB1001, which required, inter alia, DES to recognize an $83,301,400.00 reduction from its previously approved budget.

The issue of how these reductions were accomplished is the subject of this order. While the case raises serious questions of law and public policy, not all of these questions need to be resolved in this order. It is against this social/economic backdrop that the Court is called upon to issue a preliminary injunction, enjoining Dr. Linda Blessing, the Director of DES from implementing the provisions of SB 1001 as to DDD.

Some clarification of the parameters of this order, in light of the broad sweep of the relief requested by plaintiffs is in order. The Constitution of the State of Arizona, Article III, provides as follows:

> The powers of the government of the State of Arizona shall be divided into three separate departments, the Legislative, the Executive, and the Judicial; and, except as provided in this Constitution, such departments shall be separate and distinct, and no one of such departments shall exercise the powers properly belonging to either of the others. (emphasis added).

Given this limitation on this Court's power, it is perhaps best to state what is not intended:

1. It is not for the judicial branch to superimpose its judgment over the otherwise legal exercise of authority by the legislative branch of government. Therefore, nothing

[3] Not even the Plaintiff's to this litigation dispute the dire economic conditions confronting government at all levels.

herein should be construed in any way as limiting the legislature's right to make budgetary judgments and passing laws relating thereto.

2. Nor is it the Court's intention to block an otherwise legal exercise of the executive branch's implementation of a budget appropriation, or, as in this case, an ex-appropriation. It is the executive's prerogative to determine how to spend the money given it by the legislature, so long as the expenditure does not violate the law.
3. In short, the guiding principal in this inquiry as stated at the inception of our country still holds true today:

> The powers of the legislature are defined and limited; and that those limits may not be mistaken or forgotten, the constitution is written.... It is emphatically the province and duty of the judicial department to say what the law is.... [That the constitution declares that it is the supreme law of the land] confirms and strengthens the principle, supposed to be essential to all written constitutions, that a law repugnant to the constitution is void; and that courts, as well as other departments, are bound by that instrument. Marbury v. Madison, 5 U.S. 137, 176, 177, 180. 60 (1803), as quoted in State v. Leyva, 184 Ariz. 439, 443 (App. 1995).

4. While plaintiff agencies have stated a claim for an "unconstitutional taking" as well as pleading for "irreparable harm" determination from the Court, the Court believes that the preliminary injunction should be limited to the beneficiary plaintiffs only, at this time. A full trial on the issues presented by the agency plaintiffs will provide more evidence on these other issues. The sole concern of this Court with respect to the preliminary injunction, is that they represent the Home and Community Based Services provider network so necessary to carrying out the duties statutorily required of DDD.

## FINDINGS OF FACT

1. To the extent it is necessary to this ruling, any fact stated in the previous headings is incorporated herein as a finding of fact under this heading.

2. The Legislature passed, and the Governor signed SB1001 on January 31, 2009. SB1001 became immediately operative, as it contained an emergency provision. SB1001 attempted to reduce the deficit through a combination of amendments to the prior budget appropriation bills, lump-sum reductions to prior appropriations, transfers of fund monies to the general fund, expenditure reductions and mandatory transfers to the general fund, mandatory

personnel expenditure reductions, general fund reductions related to federal matching dollars, and some specific directions to state agencies.[4]

3. The Defendants had little or no time to come up with a plan to implement the DES budget reductions mandated by SB 1001.[5]

4. Defendants conducted an internal crisis decision-making process to determine how they would reduce spending and services within the DES-DDD program of services without guidance or priorities from the Legislature and without an open or public process by which defendants disseminated any information about what was being considered, or that afforded any public input from anyone, including stakeholders in the DES-DDD program, such as beneficiaries, providers and taxpayers.

5. This internal decision-making process resulted in the announcement of the service and spending reductions and suspensions on the DES website on February 23, 2009, the content of which is completely set forth in Hearing Exhibit #2 and states:

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[4] At hearing, plaintiffs made much of the fact that SB1001 contained only 14 lines and provided no guidance to the Department as to how to carry out the budget reduction in its various divisions and programs. Defendants countered with Hearing Exhibit 8, a memo from the joint budget committee of the legislature. While not law, Exh. 8, was used by the Department to structure and guide some of its reductions. In any event, it is clear that such "lump sum" (ex-)appropriations are entirely appropriate under both the constitution and the statutes.

> In the past the legislature has at times in the general appropriation bill made lump appropriations for various departments, and at times has broken them down. It has always been the custom of the various departments, and we think the only legal procedure, if the legislature appropriated a lump sum, to consider the only limitation on the division thereof among the legitimate expense of the department of that sum, the total amount appropriated. On the other hand, when the legislature has decided to make a breakdown in the general appropriation bill, the departments have always restricted their expenditures to the particular items as set forth in the breakdown. Hutchins v. Swinton, 56 Ariz. 451, 456 (1940).

[5] In her testimony the Assistant Director of DDD, Barbara Brent, testified that within a "few" days of the signing of SB 1001, executive leadership met to determine how to implement the cuts (Transcript of Proceedings of March 3, 2009, p.140, ll. 5 – 9), and that they were given "maybe 72 hours to come up with a plan." (Transcript of Proceedings of March 3, 2009, p. 143, l. 25 through p.144, l. 2)

> • Operating – In addition to reductions related to overtime, travel, purchasing, and furloughs, the Division is reducing its staffing by approximately 100 people. Case managers' caseloads will exceed the 1:39.5 ratio included in the Department's contract with AHCCCS. The Division will not be able to comply with case management, timeliness, monitoring, medical, quality management, and business deliverable requirements. (Emphasis added)
>
> • Suspend Non-Residential State-Only Services – Effective in March, the Department will suspend all non-residential home and community based services for individuals with developmental disabilities who do not qualify for the ALTCS program. 93 percent of the children and adults receiving state-only services – more than 4,000 individuals - will lose all of their services such as therapies, habilitation, employment supports, after school and summer programs, attendant care, respite and transportation. (Emphasis added)
>
> • Reduce Provider Rates – Effective March 1, the Department will reduce rates for 850 agency and 3,500 independent providers of home and community-based (HCBS), institutional, and acute services by 10 percent. Since fiscal year 2005, HCBS rates have increased by about 22 percent. In addition, the Department will to address group-home capacity issues and lower enhanced rates for specialized habilitation-communication, specialized habilitation-music, community protection, behavioral health, and day treatment and training.

6. This website publication was the first time that providers had any notice of the reductions in rates and services, thus providing them with 2-3 weeks' notice, at best, that they would lose 10% of their annual revenues due to the 10% across-the-board rate cut, and that they would lose drastically more revenues, varying from one provider to another, due to the complete suspension of services to some beneficiaries served by DES-DDD.

7. The 10% rate cut did not follow any studies, rate-setting process or any agency determination that the reduced rates are adequate, appropriate and equitable, as required by law, to assure that beneficiaries will have access to services that are reasonably available, and that providers can stay in business.

8. As of March 2, 2009, defendants had not notified any beneficiaries or providers about which beneficiaries' services would be suspended or reduced. This circumstance will likely cause many providers to provide significant amounts of unreimbursed services.

9. Indeed, there is enough circumstantial evidence to create a prima facie case that the defendants are counting on service providers to continue providing a significant amount of unreimbursed services in order to prevent immediate and irreparable harm to multiple program beneficiaries.

10. After hearing, the Court is left with the inescapable conclusion that the haste with which SB 1001 was implemented by DES/DDD has served to create nothing less than mass confusion, anxiety and uncertainty among defendants' agents, beneficiaries and service providers, as to which beneficiaries will be losing some or all of their services, and for how long. This uncertainty is caused by defendants.

11. The implementation of SB 1001 was to take effect on March 1, 2009, yet, as of March 3, 2009, no beneficiaries had received notices regarding service suspensions (that, presumably, are to become effective within 10 days from delivery of the notice).

12. As of March 3, 2009, defendants have not notified any provider agencies regarding which consumers' services will be suspended or reduced.

13. While the agency plaintiffs and their umbrella organization represent roughly only 10% of the qualified provider agencies providing services to beneficiaries under contract with DES/DDD, they present as a fair representation of such agencies in both size and services provided.

14. Defendants will completely suspend all services to some 4,000 beneficiaries of the Early Intervention Services Program of DDD, which includes beneficiaries between birth and three years of age.

15. The Court heard credible evidence that the DES budget reductions will have a significant impact on other beneficiaries of DES-DDD whose services are guaranteed by federal law, including Medicaid and the Individuals with Disabilities Education Act with respect to Early Intervention Services programs, particularly for infants and toddlers aged 0 to 3 years old. This impact will include significant and lengthy interruptions in services due to closures of providers' businesses in some instances and closures of provider programs in other areas. This is coupled with what are likely to be inordinate delays in transitioning beneficiaries from one service provider agency to another (assuming another is available), and with a complete lack of individual planning.

16. Defendants acknowledged they have not evaluated the impact of the 10% rate reduction and service cuts on any individual provider agencies, including by locale, or determined the financial ability of its private provider network to absorb both the loss of consumers and the rate reduction, and remain in business.

17. There was more than sufficient evidence presented for the Court to conclude that the efficacy and viability of a Home and Community Based Services [HCBS] network of competent, qualified providers is in substantial jeopardy, and since it the HCBS which services an overwhelming majority of DES beneficiaries, plaintiffs have shown a sufficient quantum of evidence to support the issuance of a preliminary injunction on that basis alone.

18. Plainly, the DES-DDD grievance and appeals processes, which take months to run their respective courses, will be overwhelmed by beneficiaries and providers who may seek to grieve or appeal reductions and suspensions of services, including the suspensions and reductions that were not even intended by the agency and that are likely to occur.

19. All DES-DDD program beneficiaries have individual service plans ("ISP"). ISPs are essential to plan for the highly individualized, home- and community-based services for each program beneficiary. The ISP is developed by a team that includes the beneficiary, the family and/or legal guardian, therapists and other provider representatives, and DES-DDD itself. The ISP is the document through which services are arranged, provided, evaluated and adjusted when necessary for every DES-DDD beneficiary.

20. In implementing the provisions of SB 1001, defendants have not adhered to the ISP process for any program beneficiaries in accordance with federal or state law and DES-DDD program requirements. Defendants acknowledged that in not one instance (for approximately 29,000 DES-DDD beneficiaries) has DDD evaluated the individual needs of a beneficiary before implementing these spending and service reductions and suspensions.

21. As to the State-Only funded beneficiaries, defendants admit they will suspend all services, including DES case management services, and thus no one will check on their welfare, although they are still eligible for program services. Indeed, defendants admit (Hearing Exhibit #2) that due to DES staff layoffs, their own support coordinators will have increased caseloads increased that will be in violation of AHCCCS standards.

22. The Beneficiary Plaintiffs are likely to suffer immediate and irreparable harm. That harm to plaintiffs includes at least the following:

a. The loss, suspension and/or reduction of essential services to individual plaintiffs, their wards and many other beneficiaries like them of essential services that are necessary to their immediate safety and welfare;

b. That due to the sheer number of beneficiaries effected, including state-only funded and Medicaid-eligible beneficiaries, defendants are entirely unable to respond to all the individual emergencies that are likely to arise due to these actions and reductions of service on short notice;

c. That provider agencies will fail, and other provider agencies will close programs, leading to significant interruptions in essential services that are necessary for the safety and welfare of a very vulnerable population, and all to the serious financial harm to provider agencies and their owners.

23. That defendants have not provided any meaningful notice to beneficiaries or providers regarding cuts, reductions and suspensions, nor will defendants be able to afford any meaningful due process relief.

24. That while the circumstances regarding Plaintiff Dominic Barreras are in dispute between the parties[6], the Court has determined that defendants are not sufficiently aware of his circumstances and what continuing services he needs to survive, and that there is the danger of immediate and irreparable harm to him, including a possible inability to obtain food, medicine and to be safe.

25. That with respect to plaintiff Toni McLeod and the two brothers who are her wards, the Court finds that the "solution" to their individual circumstances was brought about by defendants solely due to the filing of this lawsuit; and, that the circumstance faced by these two wards is one of great public interest, likely of repetition yet evading review, and therefore the Court will not consider this plaintiff's claims for relief as moot.

26. That with respect to individual plaintiff Beverly Hermon, as legal guardian for her son Eric Hermon, she has proven a likelihood of immediate and irreparable harm to her son, who is in services with The Centers for Habilitation, the CEO of which testified at great length to the likely closing of TCH's programs, reductions in staff, reductions in staff compensation and benefits, likely turnover, and reduction of services to all TCH enrollees.

27. That with respect to the imminent harm to the HCBS provider network, the Court finds plaintiff, Family Partners, is likely to go out of business and close all of its

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[6] The testimony reveals that during the pendency of the proceedings, and after Mr. Barreras had testified the previous day, DDD took steps to address the concerns he expressed during his testimony. Which leads one to conclude that, with respect to individual beneficiary plaintiffs, the courts should recognize that this may be a case in which a recurring legal issue may never be capable of review.

programs, for children and adults alike, including State-Only and Medicaid beneficiaries, to the irreparable harm of the hundreds of beneficiaries served by the company.

28. The Court further finds that there is a dangerous likelihood that the state's four largest providers of Early Intervention Services to infants and toddlers will close their programs, affecting hundreds of children statewide at a critical time in their development. Furthermore, defendants are likely unable to prevent serious and lengthy interruptions in such services.

29. DES admits that 93 percent of the children and adults receiving state-only services – more than 4,000 individuals, will lose all of their services such as therapies, habilitation, employment supports, and other services. (Ex. 2 at page 7).

30. The Court finds that defendants implementation of the 10% across-the-board rate cut for all DES-DDD services, including Medicaid services, has been implemented by defendants without any process or study to assure that the rates will be appropriate, equitable or adequate regarding any and all particular services. Furthermore, implementation of such rate cuts is likely to cause numerous provider agencies to close programs or go out of business altogether, and to further reduce services as will have impact on all beneficiaries served, regardless of eligibility categories.

31. Plaintiffs represent the interests of a very vulnerable population statewide, the welfare of which is of great public interest.

32. Plaintiffs have demonstrated a strong likelihood of prevailing on the merits.

33. The Court finds that the balance of the hardships tips overwhelmingly in favor of the plaintiffs. Defendants acknowledged that the cost to the State for delayed implementation of the cuts and suspensions approximate $1 million per week. This amount, while not de minimis, is not substantial in the context of a nearly $1 billion DES annual budget.

34. This case involves matters of public interest. It concerns poverty and disability programs for vulnerable people. The Court has heard testimony concerning the financial hardships of some of the plaintiffs. DES admits that "the reduction in (sic) $19,953,300 in general fund monies, actually equated to a savings of $43,121,100 in total dollars." Defendant's Memorandum in Opposition to Plaintiff's Application for a Temporary Restraining Order and Preliminary Injunction at p.5 n.4. One reasonable interpretation of this fact is that the State will lose the benefit of federal funds due to the actions challenged by plaintiff. Furthermore, if the federal government determines that the administration of the State's plan for

Medicaid enrollees fails to substantially comply with any of the provisions of 42 U.S.C. § 1396a, the federal government can cut off the state's finding. 42 U.S.C. § 1396c.

35. At the time of the hearing, plaintiff Beverly Hermon testified about defendant Linda Blessing's remarks to a legislative appropriations committee just days ago. Ms. Hermon testified that Blessing acknowledged her concerns about the safety of DDD beneficiaries as a result of these cuts. The minutes of that meeting were unavailable at the time of the evidentiary hearing, and are now available to the public. The Court takes judicial notice of Dr. Blessing's comments. Ms. Blessing's comments can be located at: http://azleg.granicus.com/MediaPlayer.php?view_id=13&clip_id=4848&publish_id=&event_id= , and her comments include:

> 1:51:00
> Kavanaugh: There were some things that you don't touch… we didn't think it necessary to put a verb in hands off CPS…, but what exactly did you do to CPS?
> Blessing: We had safety as one of the …it was the top criterion for where we would take cuts and we did not want to effect safety....We had to look at DDD case workers and CPS case workers and try to minimize the damage by doing the lowest priority, the potential risk category of our CPS calls....it's called priority 4, the potential for risk to children. We had to hit that area. It is a safety area . It is a very risky thing to do. But we could not make the numbers without going to DDD and CPS.
> Kavanaugh: Explain what you did to CPS and level 4
> Blessing: Basically, We will be unable to investigate 100% of the CPS cases.
> Kavanaugh: Isn't that required by statute to investigate, so you're going to be violating the statute.
> Blessing: Yes sir. We do not have the resources to live up to that statutory commitment. Yes Sir
> Representative Sinema: Earlier there was a reference that some people thought DES should have known not to cut certain areas. Where else could those cuts have come from
> 1:53:28 Blessing: Minimum Harm we feel we could do….Our criteria, safety being the top priority. And incidentally cutting services to individuals with developmentally disabled is a safety issue too. Because some pretty bad outcomes can happen. So, we had no choice. I frankly don't know where else we could have gone, because we did pick the least harm areas. (emphasis added).

**CONCLUSIONS OF LAW**

1. Plaintiffs have standing to bring this action and this matter is properly before this Court.

2. SB 1001 must be read in harmony with existing state laws that pertain to the DES-DDD program. These provisions are numerous. For example:

a. By statute, "developmentally disabled persons in this state shall not be denied as the result of the developmental disability the rights, benefits, and privileges guaranteed by the constitution and laws of the United States and the constitution and laws of this state." A.R.S. § 36-551.01(A).

b. Also, "any developmentally disabled person or the parent or guardian of a developmentally disabled person who believes that his rights, as established by this chapter or by the Constitution of the United States or the Constitution of Arizona, have been violated has a right to petition the superior court for redress unless other remedies exist under federal or state laws." A.R.S. § 36-551.01(S).

c. The ISP is a "written statement of services to be provided." A.R.S. § 36-551(26) ("'Individual program plan' means a written statement of services to be provided to a person with developmental disabilities, including habilitation goals and objectives, which is developed following initial placement evaluation and revised after periodic evaluations.").

d. By statute, DDD "shall ensure that all contracted developmental disabilities service providers rendering services pursuant to this chapter are reimbursed in accordance with title XIX of the social security act." A.R.S. § 36-557(H).

e. As a condition of contracts with any developmental disabilities service provider, the DDD director "shall require terms that conform with state and federal laws, title XIX statutes and regulations and quality standards. The director shall further require contract terms that ensure performance by the provider of the provisions of each contract executed pursuant to this article." A.R.S. § 36-557(J).

f. Also, DDD "shall establish a rate structure that ensures an equitable funding basis for private nonprofit or for profit agencies for [community developmental disability services] pursuant to subsection B of this section and section 36-2943. In each fiscal year, the division shall review and

adjust the rate structure based on the provisions of section 36-2959. A rate book shall be published and updated by the division to announce the rate structure that shall be incorporated by reference in contracts for client services." A.R.S. § 36-557(K).

g. "The department [DES] shall contract with an independent consulting firm for an annual study of the adequacy and appropriateness of title XIX reimbursement rates to service providers for the developmentally disabled program of both the Arizona long-term care system and the state only program. The consultant shall also include a recommendation for annual inflationary costs. Unless modified in response to federal or state law, the independent consulting firm shall include, in its recommendation, costs arising from amendments to existing contracts. The department may require, and the department's contracted providers shall provide, financial data to the department in the format prescribed by the department to assist in the study. A complete study of reimbursement rates shall be completed no less than once every five years." A.R.S. § 36-2959(A).

3. Medicaid is a joint federal-state program that provides medical services to certain low-income individuals, e.g. those who are elderly, disabled, or children. 42 U.S.C. § 1396 et seq. States can freely chose whether or not to participate in the Medicaid program, but "[o]nce a State voluntarily chooses to participate in Medicaid, the State must comply with the requirements of Title XIX and applicable regulations." Alexander v. Choate, 469 U.S. 287, 290, 105 S.Ct. 712, 714 (1985). Arizona has elected to participate in the Medicaid program and has not obtained approval to reduce its services.

4. 42 C.F.R. § 440.169(d) requires that case managers develop a specific care plan for each Medicaid eligible individual that either resides in a community setting or is transitioning to a community setting, and that a case manager monitor and ensure that care is being provided according to the ISP. Here, the reductions to state agency funding and general rate reductions will impact the ability to provide care so that care is not being provided according to the ISP.

5. Related to this, Defendants have not given meaningful notice and hearing rights to Medicaid beneficiaries related to the benefits reductions. This appears to violate numerous federal and state laws. 42 U.S.C. § 1396a(3) states that a state plan must "provide for granting an opportunity for a fair hearing before the State agency to any individual whose claim for medical assistance under the plan is denied or is not acted upon with reasonable promptness." Moreover, due process clearly includes notice and an opportunity for the beneficiary to appeal. Mathews v. Eldridge, 424 U.S. 319, 334-335 (1976); see also Grijalva v. Shalala, 946 F.Supp. 747 (D.Ariz. 1996), aff'd, 152 F.3d 1115 (9th Cir. 1998), vacated and remanded, 119 S.Ct. 1573

(1999), remanded and judgment vacated, 185 F.2d 1075 (9th Cir. 1999), settlement approved, Order Re Class Action Settlement Agreement, CIV 93-711 TUC ACM (D.Ariz. Dec. 4, 2000); J.K. By and Through R.K. v. Dillenberg, 836 F.Supp. 694 (D.Ariz. 1993).

6. Defendants' actions raise serious questions regarding non-compliance with numerous Title XIX (Medicaid) statutes and regulations.

a. First, title XIX statutes have specific ISP requirements. Medicaid case managers are required to develop an ISP for each enrollee, ensure that services are being furnished in accordance with that plan, and make certain that the services in the ISP are adequate. 42 C.F.R. § 440.169(d)(2) and (4); 42 U.S.C. § 1396a(a)(26) (stating that the state must develop a written ISP for Medicaid enrollees with inpatient mental hospital services); 42 U.S.C. § 1396a(a)(31) (ordering the State to develop an ISP for Medicaid enrollees with respect to their services in an intermediate care facility for the mentally retarded); see also A.R.S. § 36-551.01(C), (J)-(K); A.R.S. § 36-565; A.A.C. R6-6-601 and discussion in Plaintiffs' Application for Temporary Restraining Order and Preliminary Injunction at 16. If providers are not able to provide all services covered under the State plan, DES-DDD cannot ensure that beneficiaries are receiving care in accordance with their ISPs. .

b. Second, the State must guarantee a grievance process, appeals process, and access to the State's fair hearing process to Medicaid eligible beneficiaries. 42 U.S.C. § 1396a(a)(3); 42 C.F.R. § 438.402. Furthermore, the State plan is required to "provide an opportunity for a fair hearing to any person whose claim for assistance is denied or not acted upon promptly." 42 C.F.R. § 438.400(a)(1). Title XIX defines action as a "failure to provide services in a timely manner." 42 C.F.R. § 438.400(b)(4). During the grievance process, the State must continue all benefits to the enrollees. 42 C.F.R. § 438.420. Furthermore, the State must arrange for medical services for a Medicaid enrollee whose services were terminated or who was dis-enrolled from a health program for any reason other than ineligibility for Medicaid. 42 C.F.R. § 438.62.

c. Finally, Section (13)(A) of title XIX imposes procedural notice and comment requirements the State must follow when setting reimbursement rates to providers and section (30)(A) imposes for substantive findings the State must make when establishing rates. 42 U.S.C. §§ 1396a(a)(13)(A)

> & (30)(A). The regulation corresponding to section (13)(A) requires states to provide public notice of "any significant proposed change in its methods and standards for setting payment rates and services." 42 C.F.R. § 447.205. The notice must be published before the effective date of the change, appear as a public announcement in the Federal Register or newspaper, describe the proposed change in methods and standards, estimate the increase or decrease in expense to the state, explain why the agency is changing its rates, provide a location where the proposal can be viewed by the public, and give the hearing date and time, if any. 42 C.F.R. § 447.205(c)-(d).

7. Under section (30)(A), when a state seeks to modify its reimbursement rates, it must base its decision on responsible cost studies and consider efficiency, economy, quality of care, and equality of access. Orthopaedic Hosp. v. Belshe, 103 F.3d 1491, 1496 (9th Cir. 1997) (invalidating California's new rates because it did not consider if payments were consistent with efficiency, economy, and quality of care sufficient to ensure access, nor did it consider the cost of care to the providers, so the rates were arbitrary and capricious). A State must "assure that payments . . . are sufficient to enlist enough providers so that care and services are available under the plan at least to the extent that such care and services are available to the general population in the geographic area." 42 U.S.C. § 1396a(a)(30)(A). "It is not justifiable . . . to reimburse providers substantially less than their costs for purely budgetary reasons." Mission Hosp. Regional Medical Center v. Shewry, 168 Cal. App.4th 460, 474, 85 Cal. Rptr.3d 639, 646 (quoting Orthopaedic Hosp., 103 F.3d at 1499, fn. 3).

8. Furthermore, the 10% rate cut is likely invalid because DES did not make any substantive findings that a State must make when establishing rates as required by Section (30)(A). Moreover, DES did not follow its own rate-setting process. See A.R.S. § 36-2959. DES did not consider the cost to providers when it reduced rates across the board, and under Orthopaedic, this alone is enough to render the cuts arbitrary and capricious.

9. Plaintiffs have demonstrated a strong likelihood of success on four separate causes of action against defendants . Defendants' cuts likely violate the Arizona Constitution, federal and state laws, and DES rules.

10. The separation of powers doctrine enshrined in Article III of the Arizona Constitution requires that the legislative, executive and judicial branches be separate and distinct. The legislature may delegate to an agency power to adopt rules and regulations to provide for the execution and enforcement of legislation creating that agency. Hernandez v. Frohmiller, 68 Ariz. 242, 204 P. 2d 854, 863 (1949). But an agency has no powers other than those the legislature has delegated to it. Facilitec, Inc. v. Hibbs, 206 Ariz. 486, 80 P. 3d 765 (2003).

11. DDD beneficiaries have certain rights under Arizona law, including:

A. the right to live in the least restrictive alternative, as determined after an initial placement evaluation;

B. the right to receive a written ("ISP"), developed by appropriate department personnel with the participation of the client and the client's parent or guardian;

C. the right to periodic review of the ISP to measure progress; and

D. the right for a developmentally disabled child to appropriate services that are consistent with the child's written ISP.

A.R.S. § 36-551.01(C), (J)–(K), (R). Federal law refers to an ISP as an "individual care plan". The ISPs are also required by federal law and the Arizona State Plan on Medicaid, a federal contract. Defendants' actions will likely violate multiple rights of beneficiaries.

12. In addition, the cuts to benefits and services is likely to cause a violation of the State's obligations under Federal Medicaid law. In every type of provider, indeed, every business entity, there comes a point when revenue reduction is so great that the affected services can no longer be provided to anyone. DES must "continue to furnish Medicaid regularly to all eligible individuals until they are found to be ineligible." 42 C.F.R. § 435.930(b), and Agency Plaintiffs are required by contract with Des-DDD to provide all Medicaid services to Medicaid beneficiaries.

13. Arizona statutes and rules require that certain processes be followed before any changes in the level of service being provided to an individual are implemented. A.R.S. § 36-551.01(C), (J) – (K), (R) requires the development of an ISP for developmentally disabled individuals. A.R.S. § 36-565(A) requires individual evaluations to take place every six months, resulting in a new ISP. A.A.C. R6-6-601(40). Only after evaluation may the Department recommend that a beneficiary be terminated from a particular service. A.R.S. § 36-565(B). In addition, the beneficiary must receive 30 days advance written notice of any termination or substantial change to the services being provided. A.R.S. § 36-565(C). If the beneficiary requests an administrative review, the service may not be changed or terminated until a decision resulting from the review is issued. Id.

14. DES Rule R6-6-602 describes the importance of the ISP. The rule provides that the ISP should reflect the "best interest of the client", and promote services that, among other

things, prevent deterioration of the family structure, alleviate abuse or neglect, prevent the client from being a danger to himself or to others, and support a client or family in temporary crisis.

15. DES-DDD "shall establish a rate structure that ensures an equitable funding basis" for service providers serving the developmentally disabled A.R.S. § 36-557(K). This rate structure "shall" be reviewed and adjusted according to the directives in A.R.S. § 36-2959. A.R.S. § 36-2959 additionally mandates that DES "shall contract with an independent consulting firm for an annual study of the adequacy and appropriateness of title XIX reimbursement rates to service providers for the developmentally disabled program of both the Arizona long-term care system and the state only program." A.R.S. § 36-2959(A). Those rates cannot be adjusted by DES "unless policy changes, including creation or expansion of programs, have been approved by the legislature or are specifically required by federal law or court mandate." A.R.S. § 36-2959(B).

16. The Legislature made no policy changes with respect to the programs DES has elected to reduce, nor has it approved the reductions. SB 1001 does not incorporate an analysis of DES's programs and how the budget changes should be allocated according to a formulated policy of the legislature. Moreover, DES does not have the authority to change the rates paid to service providers without conducting a review of the rates and including them in a report to the Legislature. Any attempt change the rates without adherence to the correct process violates Arizona law.

17. The Superior Court of Arizona may grant a preliminary injunction under the principles of equity and "when, pending litigation, it appears that a party is doing some act respecting the subject of litigation, or threatens or is about to do some act" in violation of the rights of the applicant that "would tend to render the judgment ineffectual." A.R.S. § 12-1801(2)-(3).

18. The issuance of equitable relief is balanced upon four criteria:

1) A strong likelihood the plaintiff will succeed at trial on the merits;

2) The possibility of immediate and irreparable injury to it not remediable by damages if the requested relief is not granted;

3) A balance of hardships favors the plaintiff; and

4) Public policy favors the injunction.

Shoen v. Shoen, 167 Ariz. 58, 63, 804 P.2d 787, 792 (App. 1990); Burton v. Celentano, 134 Ariz. 594, 595, 658 P.2d 247, 248 (App. 1982).

19. Traditionally, the parties seeking preliminary injunction were required to show: "1) A strong likelihood that he will succeed at trial on the merits; 2) The possibility of irreparable injury to him not remediable by damages if the requested relief is not granted; 3) A balance of hardships favors himself; and 4) Public policy favors the injunction." Shoen v. Shoen, 167 Ariz. 58, 63, 804 P.2d 787, 792 (App. 1990). The critical element is the relative hardship of the parties. To meet this burden, the plaintiffs may establish either 1) probable success on the merits and the possibility of irreparable injury; or 2) the presence of serious questions and 'the balance of hardships tip sharply' in his favor." Id. (quoting Justice v. Nat'l Collegiate Athletic Ass'n, 577 F. Supp. 356, 363 (D. Ariz. 1983)). These two formulations represent two points on a sliding scale in which the required degree of irreparable harm increases as the probability of success decreases." Luckette v. Lewis, 883 F.Supp. 471, 474 (D. Ariz. 1995) (quoting Diamontiney v. Borg, 918 F.2d 793, 795 (9th Cir. 1990)).

20. A preliminary injunction will be granted where there is a high probability of success and the possibility of irreparable injury. It will also be granted where there is a high degree of irreparable harm, even though there is a lessened probability of success. Luckette v. Lewis, 883 F.Supp. 471, 474 (D. Ariz. 1995) (quoting Diamontiney v. Borg, 918 F.2d 793, 795 (9th cir. 1990)); Smith v. Ariz. Citizens Clean Elections Com'n, 212 Ariz. 407, 410-411, 132 P.3d 1187, 1190-1191 (2006). In this case, Plaintiffs can show both likelihood of success and a high degree of irreparable injury. Moreover, they can clearly show that public policy favors interim relief and that damages is inadequate relief.

21. This Court finds helpful the following preliminary injunction cases from the federal courts:

A. The U.S. District Court in Arizona summarized the standard:

> "The Ninth Circuit has held that "[t]o obtain a preliminary injunction in the district court, plaintiffs [are] required to demonstrate '(1) a strong likelihood of success on the merits, (2) the possibility of irreparable injury to plaintiff[s] if preliminary relief is not granted, (3) a balance of hardships favoring the plaintiff[s], and (4) advancement of the public interest (in certain cases).'" Rodde v. Bonta, 357 F.3d 988, 994 (9th Cir. 2004) (quoting Johnson v. Cal. State Bd. of Accountancy, 72 F.3d 1427, 1430 (9th Cir. 1995)). "Alternatively, injunctive relief could be granted if the plaintiffs 'demonstrate[d] either a combination of probable success on the merits and the possibility of irreparable injury or that serious questions are raised and the balance of hardships tips sharply

> in [their] favor.' " Id.(quoting Johnson, 72 F.3d at 1430)(internal quotation marks omitted). "These two alternatives represent extremes of a single continuum, rather than two separate tests...." Id. ( quoting Clear Channel Outdoor, Inc. v. City of Los Angeles, 340 F.3d 810, 813 (9th Cir.2003)). "Thus, the greater the relative hardship to [the party seeking the preliminary injunction,] the less probability of success must be shown." Clear Channel, 340 F.3d at 813. "In cases where the public interest is involved, the district court must also examine whether the public interest favors the plaintiff." Rodde, 357 F.3d at 994."

Newton-Nations v. Rogers, 316 F.Supp.2d 883, 886 -887 (D.Ariz. 2004).

B. Particularly pertinent, the Ninth Circuit has ruled that injunctive relief is appropriate to assure fair procedures to the disabled:

> "[i]t is not only the harm to the individuals involved that we must consider in assessing the public interest. Our society as a whole suffers when we neglect the poor, the hungry, the disabled, or when we deprive them of their rights or privileges. Society's interest lies on the side of affording fair procedures to all persons, even though the expenditure of governmental funds is required. It would be tragic, not only from the standpoint of the individuals involved but also from the standpoint of society, were poor, elderly, disabled people to be wrongfully deprived of essential benefits for any period of time. It would be unfortunate, but far less harmful to society, were the government to succeed in overturning the preliminary injunction but be unable to recoup all or a portion of the funds."

Lopez v. Heckler, 713 F.2d 1432, 1437-38 (9th Cir. 1983).

Indeed, the district court here granted plaintiffs a preliminary injunction when they proved financial harm to beneficiaries due to AHCCCS Administration's announcement that it was increasing beneficiaries' co-payments. Newton-Nations v. Rogers, 316 F.Supp.2d 883 (D.Ariz. 2004).

22. Plaintiffs' Application for Preliminary Injunction should be granted because: (1) Plaintiff Beneficiaries and their families will suffer irreparable injury if the preliminary injunction is not granted because services that have not been rendered cannot be replaced; and money is not a substitute; (2) the evidence shows that Plaintiffs have a likelihood of success on the merits; (3) Plaintiffs have no adequate and speedy remedy at law; (4) Defendants will not suffer substantial injury if they are enjoined from implementing the statute, and therefore the balance of hardships weigh in Plaintiff's favor; and (5) allowing providers to remain in business advances the public interest.

23. After considering all of the evidence and the record herein, the Court finds that plaintiffs have demonstrated serious questions about the legality of DDD's actions and that the balance of hardships tips sharply in plaintiffs' favor.

24. The Court therefore concludes that a preliminary injunction shall issue. Plaintiffs have met the requirements of Rule 65, A.R.C.P.

25. Plaintiffs have no speedy and adequate remedy at law.

26. Arizona Rule of Civil Procedure (65)(e) states that "[n]o restraining order or preliminary injunction shall issue except upon the giving of security by the applicant, in such sum as the court deems proper, for the payment of such costs and damages as may be incurred or suffered by any party who is found to be wrongfully enjoined or restrained." Following the interpretation of a parallel federal rule given by the federal courts, Arizona does not require that a bond be posted in order for a temporary restraining order or preliminary injunction to be valid. In the Matter of Wilcox Revocable Trust, 192 Ariz. 337, 341, ¶¶ 19-20, 965 P.2d 71, 75 (App. 1998). Requiring a nominal bond in public interest litigation is proper. Save Our Sonoran, Inc. v. Flowers, 408 F.3d 1113, 1126 (9th Cir. 2005). A court should "not set such a high bond that it serves to thwart citizen actions." Id. (listing many cases upholding this proposition). A district court has discretion when setting the amount of a bond, and it is not required to set bonds that "approximate actual damages." Id.; Barahona-Gomez v. Reno, 167 F.3d 1228, 1237 (9th Cir. 1999). A trial court properly exercises this discretion when it weighs the relative hardships of the parties, including the financial resources of the petitioner. Save Our Sonoran, Inc., 408 F.3d at 1126; Barahona-Gomez, 167 F.3d at 1237 (finding a nominal bond of $1000 appropriate even though the government argued costs accrued from being enjoined would be substantial when the legislation was in the public's interest and, although the petitioner's did not show they were indigent, many aliens are).

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